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No. 80-1914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD F. ZELEZNIK,

PETITIONER,

V.

COMMONWEALTH OF MASSACHUSETTS, ANGELINA SUPAN, SHIRLEY GALLUP, IRVING JACOBS, MARTA VILLACORTE AND ROBERT SHARON,

RESPONDENTS.

- APPENDIX -

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

Carter Zeleznik, *PRO SE*
338 Rosemary Avenue
Ambler, Pennsylvania, 19002

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, January 2, 1981

ORDER

It is hereby Ordered, that the following Applications for Further Appellate Review be denied:

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M-1699 CARTER ZELEZNIK, administrator

v.

COMMONWEALTH, et al.

(Suffolk Superior No. CA 5706;

A. C. No. 79-1061)

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By the Court,

s/ Patrick J. Hurley

Clerk

January 2, 1981

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth,

AT BOSTON, October 22,1980

In the case of

CARTER ZELEZNIK, administrator,

vs.

COMMONWEALTH

pending in the Superior

Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,--

Appeal dismissed.

By the Court,

s/R.D. Creedon, 1st. Asst.Clerk

October 22, 1980.

OVER

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 79-1061

CARTER ZELEZNIK, administrator,

vs.

COMMONWEALTH.

ORDER

The appeal from the judgment which was entered in the Superior Court on October 9, 1979, is dismissed (Carilli v. Hersey, 303 Mass. 82, 84-86 ((1939))) because that judgment conforms to our order of June 28, 1979, which is reported in Mass. App. Ct. Adv. Sh. (1979) 1336.

By the Court (Hale, C.J., Grant & Nolan, JJ.),

s/ R.D. Creedon,

Assistant Clerk.

Entered: October 22, 1980.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 77-705

CARTER ZELEZNIK, administrator,

vs.

COMMONWEALTH & others.

ORDER

Upon consideration of the appendix, transcripts and briefs under the provisions of Rule 1:28 of this court and oral argument, and upon a determination (a) that no constitutional question is presented in the report, (b) that the only question so presented has been answered in Vaughan v. Commonwealth, Mass. Adv. Sh. (1979) 1070, Kerlinsky v. Commonwealth, Mass. App. Ct. Adv. Sh. (1979) 802, and (c) that the court below has taken no action on any of the motions of the individual defendants for summary judgment (see G. L. c. 231, § 111;

Mass. R.Civ.P. 64; Doe v. Doe, Mass. Adv. Sh. ((1979)) 1412, 1413), it is ordered that the following entry be made on the docket of the Superior Court Department in the above matter:

The order denying the Commonwealth's motion for summary judgment is reversed, and a final judgment is to be entered under Mass.R.Civ.P. 54 (b), 365 Mass. 821 (1974), which dismisses the action as to that defendant. The report is dismissed insofar as it purports to present a question with respect to any of the other motions for summary judgment.

So ordered.

By the Court (Hale C.J., Grant, & Brown, JJ.),

s/Frank J. Snell
Assistant Clerk

Entered: June 28, 1979

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, September 28, 1979

ORDER

It is hereby Ordered, that the following Applications for Further Appellate Review be denied:

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M-1277 CARTER ZELEZNIK, administrator

v.

COMMONWEALTH and others

(Suffolk Superior No. 5706;

A.C. No. 77-705)

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By the Court,

s/ Patrick J. Hurley

Assistant Clerk

September 28, 1979

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, May 3, 1979.

ORDER

It is hereby Ordered, the following Applications for Direct Appellate Review be denied:

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M-1169 CARTER ZELEZNIK, Administrator

v.

COMMONWEALTH, et al.

(Suffolk Superior No. 5706;

A.C. No. 77-705)

By the Court,

s/ Frederick J. Quinlan

Clerk

May 3, 1979

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, September 27, 1977

ORDER

It is hereby ORDERED, that the following Applications for Direct Appellate Review be denied:

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M-798 CARTER ZELEZNIK, Admr.

v.

COMMONWEALTH, et al

(Appeals Court No. 77-705;

Suffolk Superior No. 5706)

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By the Court,

s/ Frederick J. Quinlan

Clerk

September 27, 1977

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 5706

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD F. ZELEZNIK,

Plaintiff

V.

COMMONWEALTH OF MASSACHUSETTS, ANGELINA SUPAN, SHIRLEY GALLUP, IRVING JACOBS, MARIA VILLACORTE AND ROBERT SHARON,

Defendants

REPORT

This is an action in tort for damages for wrongful death and conscious pain and suffering brought by the father and administrator of the estate of Arnold F. Zeleznik against the Commonwealth of Massachusetts and five of its employees at Northampton State Hospital. The case came on to be heard on the motions of each defendant for summary judgment of dismissal. Each of the motions was based upon the asserted failure of the complaint

to state a claim upon which relief can be granted, specifically, upon the defense of sovereign immunity.

After a hearing before the Special Master, and upon consideration of the recommendation of the Special Master, I denied the defendants' motions for summary judgment. Being of the opinion that the question of law raised by the defendants' motions so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, and that the question of law is of unusual public and legal significance, I hereby report, pursuant to G. L. c. 231, §111, and Rule 64 of the Massachusetts Rules of Civil Procedure, the following question, and stay all further proceedings herein except such as may be necessary to preserve the rights of the parties:

In light of decisions of the Supreme Judicial Court, such as Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612 (1973), Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc., 327 N. E. 2nd 882 (1975), Caine v. Commonwealth, 335 N. E. 2nd 341 (1975), and Lewis v. Lewis, 1976 Mass. Adv. Sh. 1764, and in view of the allegations of this Complaint, the defendants' motions for summary judgment, and the affidavits submitted by the parties in support of and in opposition to the defendants' motions for summary judgment should the defense of sovereign immunity be abrogated judicially in this case?

The Complaint, as amended, the defendants' motions for summary judgment, and the affidavits submitted by the parties in support of and in opposition to the defendants' motions for summary judgment are incorporated herein and made a part of this report.

s/ Andrew R. Linscott

Justice of the Superior Court

Dated: August 3, 1977

N.B. FOR CLERK"S USE ONLY 53
JUDGMENT ENTERED ON DOCKET October 9, 1979
PURSUANT TO MASS.R.CIV.P.58(b) AND NOTICE
SENT TO PARTIES PURSUANT TO MASS.R.CIV.P.
77(d) AS FOLLOWS:

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A TRUE COPY OF JUDGMENT DULY ENTERED ON
OCT. 9, 1979 ik

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 5706

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD F. ZELEZNIK,

Plaintiff

V.

COMMONWEALTH OF MASSACHUSETTS, AND OTHERS,

Defendant(s)

JUDGMENT FOR DEFENDANT(S) AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P.28)

This action was appealed to the -

*Appeals Court - Supreme Judicial Court -

the issues having been duly heard and the

Appeals Court having duly issued a rescript,

it is ordered and adjudged:

Judgment for defendant Commonwealth of Massachusetts. The Complaint of plaintiff is dismissed as to defendant Commonwealth of Massachusetts under Mass. Civ. P. 54(b).

Dated at Boston, Massachusetts, this 5th day of October, 1979.

MICHAEL JOSEPH DONOVAN,
CLERK OF COURT

By: s/ John J. Lynch, Asst. Clerk

****

NOTICE TO PARTIES: PURSUANT TO MASS.R.A.P. 26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUGMENT (sic.).

*Strike inapplicable words.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 5706

CARTER ZELEZNIK
Administrator of the Estate of
Arnold F. Zeleznik

vs.

COMMONWEALTH OF MASSACHUSETTS,
ANGELINA SUPAN, SHIRLEY GALLUP, IRVING JACOBS
MARIA VILLACORTE AND ROBERT SHARON

RECOMMENDATION OF THE SPECIAL MASTER

This cause came on to be heard before me pursuant to an order of the Court appointing me Special Master to hear motions for entry of summary judgment on undisputed facts under Rule 56 of the Mass. R. Civ. P.

After hearing the parties, I make the following recommendation:

From an examination of the assertions of the parties as appearing in the evidentiary material submitted to me, I find that there exists a genuine dispute as to material factual issues in this action. These unresolved issues preclude summary judgment.

The unresolved issues, briefly stated, are as follows:

A patient in one of our mental hospitals for diagnosis and observations was released by the staff after a short stay.

The patient went to Florida where within a few days of his release, he killed a nine year old boy. An examination at the time revealed that he was extremely and dangerously psychotic.

The family of the victim brings this action against the Commonwealth and certain of the staff of the hospital. The defendants moved for Summary Judgment.

Although the liability of the Commonwealth can be distinguished in part from that of the staff of the hospital, a factor in both is the defense of "Sovereign Immunity".

It may well be that that defense cannot survive the facts in this case.

At any rate, the Commonwealth at least owes the family of the victim the obligation of taking the case to an Appellate Court should the case get to a jury and prevail there.

Moreover, if the plaintiff prevails in a jury trial and the Appellate Court on an appeal of the case abolishes the defense of Sovereign Immunity, it will not be necessary to try the case again.

Should a jury find no liability apart from the defense of Soverign (sic.) Immunity the issue of its viability continues moot.

Consequently I find and rule that a summary judgment is not appropriate in these circumstances, and I recommend that it be denied.

Respectfully submitted,

s/ Paul K. Connolly
Special Master

DATE: June 27, 1977

S 1647 CHAPTER 512.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy- eight

AN ACT ESTABLISHING A CLAIMS AND INDEMNITY PROCEDURE FOR THE COMMONWEALTH, ITS MUNICIPALITIES, COUNTIES AND DISTRICTS AND THE OFFICERS AND EMPLOYEES THEREOF.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 15. The General Laws are hereby amended by striking out chapter 258 and inserting in place thereof the following chapter:-

CHAPTER 258.

CLAIMS AND INDEMNITY PROCEDURE FOR THE COMMONWEALTH, ITS MUNICIPALITIES, COUNTIES AND DISTRICTS AND THE OFFICERS AND EMPLOYEES THEREOF.

Section 1. As used in this chapter the following words shall have the following meanings;-

"Acting within the scope of his office or employment", acting in the performance of any lawfully ordered military duty, in the case of an officer or soldier of the military forces of the commonwealth.

"Executive officer of a public employer", the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town; and the board, directors, or committee of a district in the case of the public employers of a

district, and, in the case of any other public employer, the nominal chief executive officer or board.

"Public attorney", the attorney who shall defend all civil actions brought against a public employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney general; in the case of any county he shall be the district attorney as designated in sections twelve and thirteen of chapter twelve; in the case of a city or town he shall be the city solicitor or town counsel, or, if the town has no such counsel, an attorney employed for the purpose of the selectmen; in the case of a district he shall be an attorney legally employed by the district for that purpose. A public attorney may also be an attorney furnished by an insurer obligated under the terms of a policy of insurance to defend the public employer against

claims brought pursuant thereto.

"Public employee", elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth.

"Public employer", the commonwealth and any county, city, town or district, and any department, office, commission, committee, council, board, division, bureau, institution or agency thereof exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body politic or corporate.

Section 2. Public employers shall be liable for injury or loss of property or

personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of one hundred thousand dollars. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for

any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete

bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter.

Section 3. All civil actions brought against a public employer on a claim for damages cognizable under this chapter shall be brought in the county where the claimant resides or in the county where such public employer is situated, except that in the case of the commonwealth such civil actions shall be brought in the county where the claimant resides or in Suffolk county. The superior court shall have jurisdiction of all civil actions brought against a public employer.

Section 4. A civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer

of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section. The failure of the executive officer to deny such claim in writing within six months after the date upon which it is presented, or the failure to reach final arbitration, settlement or compromise of such claim according to the provisions of section five, shall be deemed a final denial of such claim. No civil action shall be brought more than three years after the date upon which such cause of action accrued. Disposition of any claim by the executive officer of a public employer shall not be competent evidence of liability or amount of damages.

The provisions of this section shall

not apply to such claims as may be asserted by third-party complaint, cross-claim or counterclaim.

Section 5. The executive officer of a public employer may arbitrate, compromise or settle any claim for damages under this chapter; provided, that any award, compromise or settlement in excess of two thousand five hundred dollars shall be made only with the prior approval of the public attorney for such public employer; provided further, however, that in any case where the public employer is the commonwealth, any award, compromise or settlement in excess of twenty thousand dollars shall be made only with the prior approval of the secretary of administration and finance. The executive officer shall not arbitrate, compromise or settle any such claim before it has been presented to him in writing or after six months have passed from the date

upon which such claim was presented to him.

The acceptance by the claimant of any such award, compromise or settlement shall be in writing and shall, except when procured by fraud, be final and conclusive on the claimant, and shall constitute a complete release of any claim against the public employer or against the public employee whose negligent or wrongful act or omission gave rise to such a claim, and a complete bar to any action by the claimant against such public employer or public employee, by reason of the same subject matter.

Section 6. The public attorney shall defend all civil actions brought against a public employer pursuant to this chapter. Service of process for such civil action shall be made upon the public attorney or, where no such public attorney has been employed for such purpose at the time service is made, service shall be made upon

the executive officer of such public employer.

Section 7. Any award, compromise or settlement of a civil action brought under this chapter in excess of twenty thousand dollars which has been approved by a public attorney for a public employer, or, in the case where the public employer is the commonwealth, approved by the secretary of administration and finance, shall be made final only after approval of same by a judge of the superior court having jurisdiction over the action.

The acceptance by the claimant of any such award, compromise or settlement shall be in writing and shall, except when procured by fraud, be final and conclusive on the claimant, and shall constitute a complete release of any claim against the public employer or against the public employee whose negligent or wrongful act or

omission gave rise to such claim, and a complete bar to any action by the claimant against such public employer or public employee, by reason of the same subject matter.

Section 8. A public employer may procure insurance for payment of damages incurred pursuant to this chapter.

Section 9. Public employers may indemnify public employees from personal financial loss and expenses, including legal fees and costs, if any, in an amount not to exceed one million dollars arising out of any claim, action, award, compromise, settlement or judgment by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law; if such employee or official at the time of such intentional tort or such act or omission

was acting within the scope of his official duties or employment. No such employee or official shall be indemnified under this section for violation of any such civil rights if he acted in a grossly negligent, willful or malicious manner.

Section 11. If the judgment in any action brought under this chapter is in favor of the public employer, judgment for costs and execution thereon may issue in favor of the public employer, if the court finds the action brought by the claimant to have been frivolous or in bad faith, and final judgment on the action shall be a bar to any other or further action being brought on the same claim or subject matter.

Section 16. This act shall take effect upon its passage and shall apply to all causes of action arising on or after August sixteenth, nineteen hundred and

seventy-seven.

SECTION 17. The provisions of chapter eight hundred and eighty of the acts of nineteen hundred and seventy-seven shall not apply to causes of action arising on or after August sixteenth, nineteen hundred and seventy-seven.

SECTION 18. The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof but shall not be construed to supersede or repeal section eighteen of chapter eighty-one and sections fifteen to twenty-five, inclusive, of chapter eighty-four of the General Laws. Any other provision of law inconsistent with any other provisions of this chapter shall not apply.

SECTION 19. If any provisions of this act or the application thereof to any person or circumstances shall, for any reason, be held to be invalid, the re-

mainder of this act or the application of such provision to persons or circumstances other than to those to which it is held invalid shall not be affected thereby.

House of Representatives, July 11, 1978. Passed to be enacted, s/Thomas W. McGee, Speaker.

In Senate, July 11, 1978. Passed to be enacted, s/Kevin B. Harrington (?), President.

July 20, 1978.

Approved

at 12 o'clock and 30 minutes, P.M.

s/ Michael Dukakkis, Governor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have today placed in the mail three copies of the Petition for a Writ of Certiorari to counsel for respondent:

W. Channing Beucler, Esq.
Asst. Attorney General
Torts, Claims & Collections
One Ashburton Place
Boston, Mass. 02108

I certify that all parties required to be served have been served.

Carter Zeleznik
338 Rosemary Ave.
Ambler, Pa. 19002

Dated: May 1981